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In the Supreme Court of the United States

OCTOBER TERM, 1943

NO. 291

UNION BROKERAGE COMPANY, a Corporation,
Petitioner,

vs.

NORMAN G. JENSEN AND CURTIS M. RIME,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND PETITIONERS SUPPORTING BRIEF

Respondents submit their brief in opposition to the petition for Writ of Certiorari predicated upon the grounds and reasons hereinafter set forth.

I.

ONLY QUESTION PRESENTED

The petitioner, Union Brokerage Company, in its petition for Writ of Certiorari sets forth seven different questions for the court's consideration in its application for a writ to review the decision of the Supreme Court of the State of Minnesota (p. 203).

The decision of the Minnesota Supreme Court is predicated only upon one ground and that is that the petitioner, Union Brokerage Company, a North Dakota corporation which operated and maintained in the State of Minnesota and established business and office at Noyes, Minnesota, did not qualify under the Minnesota Foreign Corporation Statutes. The Minnesota Supreme Court in its decision only decided and determined the question as to whether or not the petitioner, in order to maintain the above captioned action, was required to first obtain a certificate to do business in Minnesota in order to enable it to maintain an action in the Minnesota State Courts.

The sole and ultimate question in this case which petitioner seeks to review is aptly stated by Justice Youngdahl when he summarized the only and ultimate question for review in the language following:

> "The ultimate question in the instant case then is: Did the customhouse brokerage business conducted by plaintiff in a substantial way interfere with or obstruct the exercise of the granted power of congress to regulate interstate commerce." (9 N. W. (2d) p. 727) (R. p. 737).

It is conceded that if petitioner was engaged substantially in interstate commerce, the petitioner need not qualify under the Minnesota Foreign Corporation Act. The Minnesota Supreme Court decision, which is incorporated in full in the record, held adversely to petitioner.

It is therefore submitted to this Honorable Court that there is only one question presented and not seven as represented by petitioner.

II.

ADDITIONS AND CORRECTIONS TO PETITIONER'S SUMMARY STATEMENT OF THE MATTER INVOLVE INCLUDING FACT SUMMARY

The petition for the writ under heading No. II gives a summary statement of the matter involved and incorporates therein the subheading, "Factual Background of This Action" (p. 8).

Respondents deem it necessary to supplement and correct the factual background as represented by petitioner so that this Honorable Court may be properly advised as to the factual background in this case.

On September 6, 1938, when respondent Jensen sold his brokerage business at Portal to petitioner, said Jensen also had a customhouse brokerage office and business at Northgate, North Dakota, about 13 miles easterly of Portal. The petitioner, Union Brokerage Company, purchased only the Portal, North Dakota, business, and permitted Jensen to operate his customhouse brokerage business at Northgate, North Dakota (District Court Findings, R. p. 704, ff. 1 and 2).

The State District Court found that the rerouting of shipments by the Canadian Pacific Railway (hereinafter referred to as C. P. R.) through Noyes, Minnesota, rather than Portal, North Dakota, would affect 90 to 95 per cent of the brokerage business at Portal, or in other words there was a loss of foreign shipments at Portal of 90 to 95 per cent by virtue of such change (Findings 21, R., p. 708, ff. 1 and 2). Petitioner states that such rerouting affected or caused a change of 95 or more per cent by virtue of its rerouting (p. 8).

Petitioner was incorporated in 1928 and up to December 5, 1940, maintained only one place of business and

office and that was at Portal, North Dakota. Pursuant to corporate action (Exhibit 4, R., pp. 535, 536) petitioner authorized the establishment of an office at Noyes, Minnesota, three hundred miles easterly of Portal, North Dakota. The rerouting of the C. P. R. took effect July 1, 1940. Respondent Jensen opened an office at Noyes, Minnesota, three hundred miles away from Portal, North Dakota, on or about July 1, 1940. The petitioner did establish and operate a customhouse brokerage business at Noyes, Minnesota, from and after December 5, 1940, in competition with Respondent Jensen.

The Minnesota Supreme Court in its decision has defined the duties of customhouse broker thus:

> "Shipments of merchandise arriving at a port of entry must be declared as to contents and value, duly inspected by agents of the collector of customs at that port, and the prescribed tariff paid on dutiable items. The customhouse broker, for an agreed compensation, performs this service for the benefit of the shipper or importer of goods. He receives from the carrier the bills of lading covering the shipments and presents these, together with other documents peculiar to the business, to the collector of customs, who estimates the duty to be paid thereon. This sum is advanced by the broker for his client, the shipper. This service, of necessity, involves a working knowledge of the rules and regulations of customs law, as well as sufficient information to enable the broker to set up and maintain proper books and records in conformity with federal requirements relating to customhouse brokers. In order that a broker may be in a position to render this service to a shipper, it is first necessary that the particular shipment be consigned to a specific broker. A responsibility rests upon the common carrier of goods to deliver them to none other than the consignee named in the bill of lading. Too, unless the proper consignee presents the bill of lading to the customs officers for payment of duty, payment is refused" (R. p. 729) 9 N. W. (2d) 722, 723.

Respondent Jensen resigned as an officer and employee of petitioner at the request of petitioner on November 5, 1940 (R. p. 359, f. 2).

Prior to the time that petitioner opened its office at Noyes, Minnesota, in competition with respondent Jensen, the petitioner was not authorized to act as a customhouse broker at Noyes, Minnesota, as it had failed to qualify to act as such under the regulations of the Treasury Department, and, further had not procured from the State of Minnesota the required certificate to do business in Minnesota.

Article 1410, Customs Regulations of 1937, provides:

> "However, a licensee having a license in force in one district may on application to the committee be granted a license to transact business in another district without further examination, **provided it appears on investigation that the licensee is authorized to do business in the state or states in which such other district is situated, and is prepared and qualified to render efficient service in such other district.**" (Emphasis supplied.)

The petitioner, Union Brokerage Company, until such times as it furnished bonds and qualified as a broker at Noyes, Minnesota, could not and did not transact business as a customhouse broker at Noyes, Minnesota. Certain shipments were sent through Noyes designating the petitioner as the customhouse broker. Claude Phillips, the chief clerk for the Soo Line and the Great Northern Railways at Noyes, testified in substance that such shipments, designating petitioner as customhouse broker, were refused until the shipper designated a qualified customs house broker at Noyes. Petitioner's own witness, Claude Phillips, a former customhouse official, testified clearly as to the handling of such shipments at

Noyes, Minnesota. The pertinent testimony of Mr. Phillips is found on R., p. 415, f. 3; p. 416, ff. 1, 2, as follows:

> "Q. Did you not tell the court, in substance, that if a bill of lading came with a broker designated on it like, we'll say, the Union Brokerage Company, and that broker was not there to receive it to handle it, before a change could be made the originating railroad would have to furnish a so-called carrier's certificate?
>
> A. Yes.
>
> Q. And the originating railroad in order to acquire the authority to furnish that certificate would have to communicate with the shipper and have the shipper make the designation?
>
> A. That's the way they did it.
>
> Q. In other words, if there is a shipment sent to the Union Brokerage Company and there was no one there to handle it for them some other broker made an application to the forwarding railroad for a shipper's certificate and that forwarding railroad would then have to communicate with the shipper and get the authority to issue the shipper's certificate?
>
> A. Yes.
>
> Q. That is all that amounted to?
>
> A. Yes."

There is nothing in the record to the effect that bills of lading were dishonored, repudiated, altered or destroyed in order that the respondents might appropriate petitioner's business. Jensen did not issue any carrier's certificates as the same were issued only by the direct authority of the shippers, and not otherwise. A rubber stamp with Jensen's name thereon was used when Jensen was finally determined, in certain cases, to be the broker. Jensen, therefore, could not "convert" petitioner's business, as such business was solely the shippers who could deal with anyone they designated. The

above quoted testimony of Claude Phillips speaks for itself and needs no further explanation.

Petitioner represents that an importer electing to clear his own shipments must comply with the requirements imposed on a broker before his shipments can be cleared. Such is not the situation. Under the Regulations of 1937, an importer or his employee need not be licensed as a customhouse broker and he need only furnish a single entry bond covering the value of the shipment and the estimated duties, in place of the term entry bond.

Petitioner also represents that "the broker is relied on by the government for protection of the public revenues" (p. 11). This is wrong. The federal government is amply protected in its revenues and collection of duties: first, by the requirement of sufficient bond by the importer or agent or broker; and, secondly, under the law the government can retain possession of the merchandise until the duty is paid, and can enforce or conduct a sale of the merchandise for the payment of duty (Secs. 490, 491, Tariff Act of 1930). The customhouse broker, therefore, does not protect the public revenues. He acts merely, as held by the Minnesota Supreme Court, as an independent contractor in rendering strictly personal services for the owners of shipments. This service is performed wholly within the confines of the state in which he operates.

Under the heading of "Fact Summary" petitioner again makes the statement that respondent Jensen converted its business to himself by setting up a business at Noyes, Minnesota (p. 11). Again we repeat that petitioner had operated at only one place, namely, Portal, North Dakota, and had never had an office at any other state, city, village, or place until after respondent Jensen had opened his own office at Noyes, Minnesota, three

hundred miles easterly of Portal, North Dakota. Petitioner in December, 1940, set up its own business in competition to respondent Jensen. As submitted above, there was no conversion of any business.

Under the factual summary, petitioner now splits the ultimate issue into four parts. There is but one ultimate issue in this case. The Supreme Court of Minnesota so held and summarized the ultimate issue as follows:

> "Did the customhouse brokerage business conducted by plaintiff (petitioner) in a substantial way interfere with or obstruct the exercise of the granted power of congress to regulate interstate commerce" (R. p. 737) (9 N. W. (2d) 727).

This ultimate issue as so summarized presents the only question and the only issue in this case.

III.

JURISDICTIONAL STATEMENT SUPPLEMENTED

Respondents have no quarrel with the jurisdictional statement made, except that there should be incorporated for the court's information the following regulations of the Treasury Department concerning customhouse brokers:

> "Article 1410 Customs Regulations of 1937.
>
> **Licenses for More Than One Customs District.**—Separate licenses shall be required if the licensee desires to transact customs business in more than one customs district. However, a licensee having a license in force in one district may on application to the committee be granted a license to transact business in another district without further examination, provided it appears on investigation that the licensee is authorized to do business in the state

or states in which such other district is situated, and is prepared and qualified to render efficient service in such other district. * * *" (Emphasis supplied.)

"Article 1411 Customs Regulations of 1937.

License, When Not Required.—(a) An importer or exporter transacting customs business solely on his own account and in no sense on behalf of another is not required to be licensed, nor are his authorized regular employees or officers who act only for him in the transaction of such business.

(b) A common carrier transporting merchandise for another may make entry for such merchandise for transportation in bond without being licensed as a customhouse broker.

(c) A resident agent employed by one or more vessels or lines of vessels is not required to be licensed as a customhouse broker in order merely to enter or clear vessels consigned to him by a principal. Proof of the agency must be filed with the collector.

(d) An employee of a licensed customhouse broker is not required to be licensed in order to act solely for his employer, but in order that such employee may sign customs documents on behalf of his employer the broker must file with the collector a power of attorney for that purpose. Each broker shall file with the collector at each port where the business is to be transacted an authorization specifically naming each employee who may properly act for him. A broker must promptly give notice of any change in the authority of such employees and must exercise such supervision of them as will insure proper conduct on the part of the employees in the transaction of customs business. Each broker will be held strictly responsible for the acts or omissions of his employees within the scope of their employ-

ment, and for acts or omissions of such employees which, in the exercise of reasonable care and diligence, the broker should have foreseen. Every attorney in fact acting for a licensed customhouse broker must be a resident of the United States."

IV.

REASONS FOR DENIAL OF WRIT

Petitioner has set forth twelve reasons for the allowance of the writ. These claimed reasons will be briefly analyzed in order that this Honorable Court may be informed that there is in fact no important question of federal law involved and the case is not one of importance to the government of the United States, customhouse brokers, and people generally (p. 30).

1.

The first reason advanced by petitioner is that the Minnesota Supreme Court decision has caused petitioner great and irreparable injury (p. 30). This, if true, is a personal matter between petitioner and respondents and does not raise a question of national concern nor does it affect in any way the Tariff Act of 1930, as amended, or the public revenues of the United States, or in fact any federal law, treaty, or the constitution. The petitioner, a North Dakota corporation, saw fit not to comply with the Foreign Corporation Act of the State of Minnesota. Had the petitioner so complied and thus placed itself on a parity with Minnesota domestic corporations, petitioner would have necessarily been permitted to prosecute any action it might have in Minnesota courts.

2.

The second reason advanced is that petitioner now claims that this is the first case in which this Honorable Court has had directly before it the construction of Section 1641, Title 19, U. S. C. A., as amended, and the rules and regulations of the Treasury Department relating to customhouse brokers and their relation to the tariff revenue system of the United States, and to foreign commerce (p. 30).

The record clearly discloses that at no time in this case was the construction of the Tariff Act, Regulations, any other federal law, treaty or constitution, questioned. Such act and all regulations promulgated pursuant thereto were accepted without question by petitioner respondents, the State District Court, and Supreme Court of the State of Minnesota. There is, therefore, no question of construction presented to this court.

The only issue decided by the Minnesota Supreme Court, which petitioner is now requesting this court to be reviewed, is whether or not petitioner, Union Brokerage Company, a North Dakota Corporation, in order to legally function as an incorporated customhouse broker in the State of Minnesota, must first qualify under the Minnesota Foreign Corporation Act before it can transact customhouse brokerage business in the state and have the privilege of maintaining actions in the Minnesota courts. As heretofore pointed out, the regulations expressly provide that a licensed customhouse broker licensed to do business in one district may transact business in another district, without further examination, "provided it appears on investigation that the licensee is authorized to do business in the state or states in

which such other district is situated, and is prepared and qualified to render efficient service in such other district" (Article 1410, Customs Regulations of 1937) (Emphasis supplied).

3.

The third reason submitted by petitioner is the claim that this is the first case in which this court, or other United States courts, have had directly before them for construction the question of whether or not a customhouse broker is an instrumentality provided for by congress, employed to protect the national revenue, the importers, and exporters, and aid in the free flow of commerce between foreign nations and the United States (pp. 30, 31).

A customhouse broker is in no sense an employee of the federal government and particularly, he is not employed to protect the national revenue; neither is he an instrumentality of interstate commerce. The Minnesota Supreme Court decision very ably summarizes the duties of customhouse brokers, and under the authorities therein cited, it is clear that a customhouse broker is not a federal instrumentality in any sense and that whatever part a customhouse broker has with relation to interstate commerce is indirect, remote, and collateral thereto. Reference is made to the cases of:

State v. Oberle, Inc., 190 La. 1053, 183 So. 347;

Federal Compress and Warehouse Co. v. McLean, 291 U. S. 17, 54 S. C. T. 267, 269, 78 L. Ed. 622;

People ex rel. Tower v. State Tax Commission, 282 N. Y. 407, 26 N. E. (2d) 955;

Duluth, S. S. & A. R. v. Wilson, 200 Mich. 313, 167 N. W. 55, L. R. A. 1918E 763.

These cases will later be briefly discussed.

4.

The fourth reason given by petitioner is that this is the first case in which the courts have had directly before them the question of whether or not the business of a customhouse broker is interstate commerce, and, if so, if it is "interfered with" or "burdened" by such restrictive requirements as those imposed by the Minnesota Foreign Corporation Act, requiring the petitioner, before it can have access to the courts of Minnesota, and before it can do business in the State of Minnesota, to qualify, pay the same franchise tax as a domestic corporation, and to appoint an agent upon whom service of process can be made (p. 31).

This very question of whether or not customhouse broker is engaged in interstate commerce has been decided by the Louisiana Supreme Court in the case of State v. Oberle, Inc., 183 S. 437, supra. This case is cited with approval in the Minnesota Supreme Court case. In that case, it was definitely held that the Louisiana occupational license tax, to which Louisiana sought to subject defendant, as a customhouse broker, did not interfere with the commerce laws of the United States, and, particularly the importation and exportation of commerce. In answer to the defense that a customhouse broker was engaged in interstate commerce, that court held in effect that a licensed customhouse broker was an independent contractor, engaged in rendering strictly personal services in the state and is not an instrumentality of the federal government so as to be immune from such occupational tax. See also:

Duluth, S. S. & A. R. Co. v. Wilson, 167 N. W. 55, supra;

People ex rel. Tower v. State Tax Commission, 282 N. Y. 407, 26 N. E. (2d) 955;

Hopkins v. United States, 171 U. S. 578, 43 L. Ed. 290, 19 S. Ct. 40.

5.

The fifth reason of petitioner is predicated upon the alleged ground that this case of the utmost importance to the federal government and particularly to the Department of Treasury and that it affects or protects the public revenue and foreign commerce (p. 31).

Respondents fail to see why this case, in any degree whatsoever, is important to the Federal Government or the Department of Treasury. No claim has been made in the trial of the case in the lower court, or in the appeal to the Minnesota Supreme Court, that the public revenue in any way, shape, or manner is jeopardized. The United States government has not lost one cent on account of the customhouse broker activities of petitioner or respondents. The Federal Government by virtue of the Tariff Act and the regulations is fully protected in the collection of duties, as provided by law, and as heretofore set forth, through the medium of required bonds, the custody of shipments until the duty is paid, etc. It is again repeated that none of the provisions of the Tariff Act nor of the regulations, nor the construction of the same, are involved in this controversy. The sole and only question is whether or not the State of Minnesota has the right to require a foreign corporation, before it can engage in business in the State of Minnesota, and have use of its courts, must, as a condition precedent thereto, qualify under such state law, pay the franchise tax equal to that of domestic corporations, and appoint a resident agent upon whom service of process might be made. Had

petitioner obeyed the law of the State of Minnesota, it would have had the same privileges as are afforded domestic corporations. The Minnesota Supreme Court holds that a customhouse broker is neither a federal instrumentality nor engaged substantially in interstate commerce, and that such foreign corporation, the petitioner herein, is not immune or above the Minnesota State Law requiring compliance with its Foreign Corporation Statute.

6.

Under the sixth reason, petitioner states that the Minnesota Supreme Court decision appears to be in conflict with its own prior decisions on the subject of what constitutes "commerce," and a "burden" or "obstruction" to commerce (p. 31).

Respondents quarrel with such statement. On the contrary, it plainly appears, from the able opinion written by Justice Youngdahl, that this decision harmonizes with its own prior decisions of the Minnesota Supreme Court in accordance with citation of Minnesota cases in such opinion.

7.

The seventh reason given is that probably the Minnesota Supreme Court decision conflicts with decisions of this Honorable Court defining commerce with foreign nations (p. 32).

Analysis of cases of this court, as hereinafter discusseed in this brief, conclusively show that the decision of the Minnesota Supreme Court is in accord and in harmony with pertinent decisions of this court.

8.

The eighth reason advanced is that the Minnesota Supreme Court decision recognizes that there is involved an important question of federal law not heretofore ruled on by this court and which should be settled by this court (p. 32). The Minnesota Supreme Court, through the opinion of Justice Youngdahl, states: (9 N. W. (2d) 725) R. 734

> "Probably no subject in the field of law has created greater ambiguity and confusion among text writers and court opinions than the interpretation of the commerce clause of the constitution. **Because the determination of whether a business is interstate or intrastate commerce is so essentially a federal question, we necessarily look to the decisions of the United States Supreme Court for the broad controlling principles upon which this decision must rest.**" (Emphasis supplied.)

Accordingly the Minnesota Supreme Court decision is founded upon decisions of this court and the principles evolved thereunder.

9.

The ninth reason cited claims that the Minnesota Supreme Court decision challenges the effectiveness of a license issued by the Federal Government and denies the validity and authority ostensibly conferred thereby on the licensee in a district embracing more than one state because same denies petitioner the right to appeal to the Minnesota courts for protection of its property in that part of the district which lies in Minnesota (p. 32). The Minnesota decision does not directly or indirectly challenge a customhouse broker's license or its effectiveness in any sense whatsoever. Neither is the validity of any such license, up to petitioner's petition in

this action, questioned. It again appears that petitioner is evading the simple, ultimate issue or question decided by the Minnesota Supreme Court: whether or not petitioner, a foreign corporation, must, in doing business in Minnesota, qualify under the Minnesota Foreign Corporation Act before it can maintain an action in Minnesota courts. None of the statutes, codes, or regulations of the Federal Government concerning the Tariff Act or the licensing of customhouse brokers have been challenged in this suit.

10.

The tenth reason of petitioner is based upon the claim that if the Minnesota Supreme Court decision becomes a precedent that then an incorporated foreign customhouse broker "will necessarily be forced to suffer the burden of qualifying and keeping qualified, as a foreign corporation" in the states in which it does business (p. 32). Most states in the union, if not all states, have foreign corporation statutes somewhat similar in tenor and effect. The principal purpose of such act is, that, if such foreign corporation does actually do business within the confines of a state, it must be placed in the same category, or on a parity, with domestic corporations. It is a reasonable requirement to impose the same franchise tax as it imposes upon its own domestic corporations. Further, by qualifying in the state, it insures proper service of process upon such foreign corporation without forcing a legitimate claimant to seek redress in a foreign jurisdiction or state. Petitioner would have a foreign corporation enjoy greater benefits and immunities than those which a state grants to its own domestic corporations or persons. It would have petitioner reap the benefits of doing business in Minnesota and be sub-

jected to none of the burdens, rules, regulations, and laws applicable to native corporations and citizens.

11.

The eleventh reason given by petitioner for allowance of the writ is based upon the charge that the Minnesota Supreme Court's decision was probably the result of a "confused concept" of the problem involved in the case and, that but, for this confusion, the result would have been different (pp. 32, 33). The petitioner calls attention to the Minneosta Supreme Court's summation of the ultimate question in the case. Petitioner further believes that the Minnesota Supreme Court was "confused" in its finding or definition as to the duties and activities of a customhouse broker. The petitioner quotes from the Minnesota Supreme Court decision as follows:

> "The ultimate question in the instant case then is: Did the customhouse brokerage business conducted by plaintiff **in a substantial way interfere with or obstruct the exercise of the granted power of congress to regulate interstate commerce**" (R., p. 737) (9 N. W. (2d) 727).
>
> * * * * *
>
> "The broker acts as an independent contractor to perform this personal service for the shipper. He does not come into contact with the commerce itself in any way in so far as its actual movement is concerned. He is at the most an aid or facility to the commerce and but remotely, if at all, affects it. We fail to see how such broker is an instrumentality of the commerce. Therefore, **it seems to us that the statutory requirement is not an obstruction or interferences with interstate commerce**" (R., p. 739) (9 N. W. (2d) 728).

Respondents fail to see where the ultimate question, as above quoted, and the clear holding concerning customhouse brokers, is in any sense a confused one, or vague or uncertain in any sense or manner. It would seem if the decision were confusing or ambiguous in any way that the proper remedy of petitioner would have been to petition for a rehearing by the Minnesota Supreme Court, in order to give that court, if it so desired, the opportunity of clarifying its decision.

On the contrary, respondents maintain that the Minnesota Supreme Court, predicated upon decisions of this court, has very ably analyzed and defined the ultimate question in the quotation first above set forth, and has further very ably made its finding as to the activities and duties of a customhouse broker. It is crystal clear that the Minnesota Supreme Court not only has a keen conception of the problem presented, but also it decided said question of interstate commerce with relation to a customhouse broker in a manner harmonious with the decisions of this court.

12.

The twelfth and last reason given for granting the petition is that public interest will be promoted by prompt settlement of the questions involved which are vital and important to the government of the United States, customhouse brokers, and petitioner (p. 33).

For reasons hereinabove given, it is clear that this is not an important question to the government of the United States nor to customhouse brokers, nor the people generally. This case involves the simple issue of whether or not the petitioner, a foreign North Dakota corporation, can operate and maintain an office and business in the State of Minnesota, use the Minnesota courts

in an action for its benefit, without being amenable to the Minnesota Foreign Corporation Statutes which require such foreign corporation to obtain a certificate of authority, pay the same franchise tax or fees as domestic corporations do, and appoint an agent upon whom service of process can be made. It is not a question of public interest. It concerns only the petitioner and respondents. The Supreme Court decision lays down the simple and reasonable requirement that foreign corporations shall have no greater privileges or benefit than that afforded to its own domestic corporations.

V.

FURTHER ARGUMENTS IN OPPOSITION TO PETITION FOR WRIT AND STATEMENTS IN SUPPORT THEREOF

A.

THE SOLE QUESTION AND ULTIMATE ISSUE

The Minnesota Supreme Court, in reviewing the State District Court, considered only respondent's assignment of errors I A and D (R., pp. 753, 754), and reversed the State District Court on the ground that said court was in error as a matter of law in holding: * * * that the customhouse brokers, involved herein, are established as federal instrumentalities and are engaged in interstate commerce in facilitating the free flow of commerce by the United States and the Dominion of Canada (part of findings 5, R., p. 699, f. 1).

The Minnesota Supreme Court, in reversing the judgment of the District Court, did not deem it necessary to pass upon the numerous other assignments of error. Therefore, the only question, and ultimate issue in this

case, as decided by the State Supreme Court, and which can be considered by this Honorable Court, is the ultimate issue and question so aptly and ably expressed by the Minnesota Supreme Court as follows:

> "Did the customhouse brokerage business conducted by plaintiff (petitioner herein) **in a substantial way interfere with or obstruct the execution of the granted power of congress to regulate interstate commerce**" (R., p. 737) (9 N. W. (2d) 727).

This Honorable Court is invited to read the well written, clear, and concise opinion of the Minnesota Supreme Court, as it is apparent from said opinion that that court, in deciding this ultimate issue, engaged in exhaustive study and research. The Minnesota Supreme Court arrived at its decision by analyzing the numerous decisions of this court for the controlling principles upon which its decision rested. Justice Youngdahl has so stated, as evidenced by his statement as follows:

> "Because the determination of whether a business is interstate or intrastate commerce is so essentially a federal question, we necessarily look to the decisions of the United States Supreme Court for the broad controlling principles upon which this decision must rest" (R., p. 734) (9 N. W. 725).

This has been the policy of the Minnesota Supreme Court, where federal questions are concerned, as evidenced by the cited case of Palm Vacuum Cleaner Co. v. Bjornstad, 136 Minn. 38, 161 N. W. 215.

B.

CUSTOMHOUSE BROKER'S BUSINESS AND NATURE OF SERVICE RENDERED

(1)

In view of various statements made by petitioner, and its argument concerning customhouse brokers and their activities, respondents deem it necessary to commend to some extent on the functions and duties of customhouse brokers in order that this court might be rightfully informed thereof.

Petitioner would have this court believe that all shipments of merchandise from Canada arriving at a port of entry in the United States can go no further until released from customs by means of the services performed by the customhouse broker (brief, pages 36, 37). Such is not the situation, as, under the Tariff Act and Regulations, shipments can be made in bond from a port of arrival to another port (Article 1411 (b), Regulations of 1937).

Further, under the Tariff Act and Regulations, it is not necessary for the shipper or importer to employ the services of a customhouse broker. The owner of the shipment, his agent or employee, may clear through customs without the services of a broker (Article 1411 (a), Regulations of 1937).

Petitioner's petition further states that the customhouse broker is relied on by the government for protection of the public revenues (Pet. Br., page 11). Respondents have heretofore stated in this brief that under the Tariff Act and Regulations the duties and revenue of the Federal Government are fully protected by possession of the merchandise until all duties are paid or by virtue of

bonds whether such bonds are furnished by the customhouse broker or the owners of the merchandise. It is clear, therefore, that a customhouse broker in no manner protects or conserves the revenue of the United States.

(2)

Customhouse Broker Is Not a Federal Instrumentality

Petitioner quarrels with the Minnesota Supreme Court decision which holds that Union Brokerage Company, petitioner herein, is not engaged in interstate commerce, and that petitioner is not an instrumentality employed to protect the revenue of the United States and to aid in the free flow of foreign commerce.

The Minnesota Supreme Court held that petitioner was an independent contractor, rendering personal services within the confines of the State of Minnesota; that petitioner was engaged in intrastate commerce for profit; and that the activities of petitioner in relation to interstate commerce were only remote and would not encroach substantially thereon. The Minnesota Supreme Court held further that the Minnesota Statutes requiring foreign corporations to obtain certificates of authority before bringing action in state courts is a reasonable requirement as applied to a foreign corporation operating an intrastate brokerage business in Minnesota.

Respondent, in such Minnesota Supreme Court case, contended that the State District Court committed error in holding that petitioner was a federal instrumentality engaged in commerce. Respondents maintained that the business of petitioner was purely local and intrastate in character, and, that if it interfered with interstate commerce at all, it did so indirectly and as an aid or

facility of such commerce, and that petitioner was, therefore, subject to the provisions of the Minnesota Foreign Corporation Act. This position and contention of respondents was upheld by the Minnesota Supreme Court.

The Minnesota Supreme Court in deciding that petitioner was not a federal instrumentality nor was engaged in interstate commerce, and discussing the character of petitioner's business said:

> "In applying this principle so recently enunciated by the Supreme Court of the United States to the facts here presented, it is necessary to consider the character of the business in which plaintiff was engaged. Customhouse brokers are not public officers but perform purely personal services as agents of the shippers. Duluth, S. S. & A. R. Co. v. Wilson, 200 Mich. 313, 167 N. W. 55, L. R. A. 1918E, 763; People ex rel. Tower v. State Tax Comm., 282 N. Y. 407, 26 N. E. (2d) 955; State v. Wm. J. Oberle, Inc., 190 La. 1053, 183 So. 347. True, under the Tariff Act, customhouse brokers are required to be licensed in order to do business, but the sole purpose of that requirement is to protect the collection of tariffs due the federal government. State v. Wm. J. Oberle, Inc., supra. The office of plaintiff was situated in Noyes, Minnesota, and all of its records pertaining to that business were kept there. The business was transacted entirely within the borders of this state. It had nothing whatever to do with the actual importation or exportation of articles of commerce. Its duty as an agent of the shipper was merely to pay the customs duties and make settlement subsequently with its principal, the shipper. Customhouse brokers represent private persons. They receive no fees or emoluments from the federal government. A customhouse broker's license authorizes the holder to transact business in certain customs collection districts. He cannot represent a claimant before the treasury department unless enrolled as attorney or agent in conformity with the requirements of the

department. We think this quite far removed from being an agent of the United States, or being engaged in a governmental function. It is urged that because the customhouse broker pays the duties he has a direct and substantial connection with the commerce; that the commerce would be delayed if the duties were not paid. It must be borne in mind, however, that under the tariff act the shipper himself or his agent can perform this service. Article 1411, Custom Regulations of 1937, provides in part: '(a) An importer or exporter transacting customs business solely on his own account and in no sense on behalf of another is not required to be licensed, nor are his authorized regular employees or officers who act only for him in the transaction of such business.' The broker acts as an independent contractor to perform this personal service for the shipper. He does not come into contact with the commerce itself in any way in so far as its actual movement is concerned. He is at most an aid or facility to the commerce and but remotely, if at all, affects it. We fail to see how such broker is an instrumentality of the commerce. Therefore, it seems to us that the statutory requirement is not an obstruction or interference with interstate commerce" (R., pp. 737, 738) (9 N. W. (2d) 727, 728).

A case cited and quoted from at length in the Minnesota Supreme Court decision is the Louisiana case decided in 1938, State v. Wm. J. Oberle, Inc., 190 La. 1053, 183 So. 347.

In that case the state of Louisiana attempted to impose a state occupational tax on a customhouse broker, Wm. J. Oberle, Inc. The action was brought to compel the defendant customhouse broker at New Orleans to pay such occupational license tax based upon the broker's receipts from importers. The state contended in that case that the defendant was engaged in a purely private business and was subject to such general occupational

tax. The defendant customhouse broker asserted that he was duly licensed by the Secretary of Treasury of the United States and could not be subjected to any occupational license tax as same would unconstitutionally burden a purely federal and quasi federal function and would interfere with the commerce laws of the United States. The lower state court held for the defendant customhouse broker that said state occupational tax law was unconstitutional in so far as same applied to customhouse brokers. The state appealed from this judgment, and the Louisiana Supreme Court reversed, holding that a customhouse broker was subject to the Louisiana occupational tax. The Louisiana Supreme Court, in so holding, discusses very ably the activity of customhouse brokers, its relation, if any, to the interstate commerce, and the reason such occupational tax was valid as applied to customhouse brokers.

The Louisiana Supreme Court, in holding that a customhouse broker was engaged in intrastate commerce only, that said broker was not a federal instrumentality and that the broker was subject to the Louisiana occupational tax, said:

> "(1) It is true that defendant is a customhouse broker, duly licensed by the Secretary of the Treasury of the United States under Section 641 of Article 1391 of the Tariff Act of 1930 (Transcript, p. 3).
>
> -1- But we fail to find any provision in the Tariff Act of 1930 to the effect that customhouse brokers are agents of the National Government, discharging governmental functions.
>
> To the contrary, the Treasury Department defines a customhouse broker as including 'all persons, partnerships, corporations, and associations transacting customs business at a customhouse in behalf

of others generally.' Art. 1392 of Tariff Act of 1930. (Transcript, p. 7.)

Customhouse brokers represent private persons. They receive no fees or emoluments from the United States Government, as testified by the president of defendant (Transcript, pp. 26, 27).

A customhouse broker's license only authorizes the holder to transact business in customs collection districts. They cannot represent a claimant before the Treasury Department, unless enrolled as attorney or agent in conformity with the requirements of the department (Department Circular No. 230, Treasury Department 42773). Arts. 1402 and 1403 of Tariff Act of 1930 (Transcript, pp. 13, 14). This is very far from being an agent of the United States, or being engaged in a governmental function. They are no more discharging governmental functions than are the lawyers licensed to represent their clients before the Treasury Department (Art. 1403, Transcript, p. 14). At the most, customhouse brokers are independent contractors, pursuing a private business for profit, and the fact that their occupation is regulated by law does not make those engaged therein government officials, or result in immunity from taxation.

In Federal Compress & Warehouse Co. v. McLean, 291 U. S. 17, 54 S. Ct. 267, 269, 78 L. Ed. 622, the Supreme Court of the United States said:

'Appellant's license under the United States Warehouse Act did not confer upon it immunity from state taxation, for neither the appellant nor its business was, by force of the license, converted into an agency or instrumentality of the federal government. The Warehouse Act (7 U. S. C. A. No. 241, et seq.) confers upon licensees certain privileges and secures to the national government, by means of the licensing provisions, a measure of control over those engaged in the business of

storing agricultural products who find it advantageous to apply for the license. The government exercises that control in the furtherance of a governmental purpose to secure fair and uniform business practices. But the appellant, in the enjoyment of the privilege, is engaged in its own behalf, not the government's, in the conduct of a private business for profit. It can no longer be thought that the enjoyment of a privilege conferred by either the national or a state government upon the individual, even though to promote some governmental policy, relieves him from the taxation by the other of his property or business used or carried on in the enjoyment of the privilege or of the profits derived from it. Susquehanna Power Company v. State Tax Commission, 283 U. S. 291, 51 S. Ct. 434, 75 L. Ed. 1042; Fox Film Corporation v. Doyal, 286 U. S. 123, 52 S. Ct. 546, 76 L. Ed. 1010; Broad River Power Company v. Query, 288 U. S. 178, 180, 53 S. Ct. 326, 77 L. Ed. 685.'

* * * * *

'The mere extension of control over a business by the national government does not withdraw it from a local tax which presents no obstacle to the execution of the national policy. Compare Susquehanna Power Co. v. State Tax Commission, supra; Broad River Power Company v. Query, supra. See Willcutts v. Bunn, 282 U. S. 216, 226, 230, 51 S. Ct. 125, 75 L. Ed. 304 (71 A. L. R. 1260).'

It is clear from the above decision that the mere extension of control over the business of customhouse broker by the national government does not withdraw it from a local tax, as defendant, in the enjoyment of the privilege under its license, is engaged in its own behalf, and not in behalf of the government, in the conduct of a private business for profit.

As the local tax claimed by the state in this case does not impose a burden upon a federal function,

it presents no obstacle to the national policy in the control and administration by the government of its customs. Obviously, the concern of the government is to see that the proper duties are collected, and the licensing of competent customhouse brokers is merely in promotion of the governmental policy. But neither the defendant, nor its business of customhouse broker, was, by the force of the license, converted into an agency or instrumentality of the federal government.

-2- (2) We fail to see wherein the occupational license tax to which the state seeks to subject defendant, as a customhouse broker, would interfere 'with the commerce laws of the United States and particularly the importation and exportation of commerce,' as contended by defendant. The evidence fails to show that defendant is engaged in either. Defendant receives its business from importers of medchandise, private persons (Transcript, pp. 26, 27). Defendant is not itself an importer of merchandise. If it were, it would not be licensed as a customhouse broker" (183 So. 347, 348).

In one of the very few cases concerning the question as to whether or not the customhouse broker is a federal employee, a federal instrumentality, and the nature of his duties, we find the case of Duluth, S. S. & A. R. Co. v. Wilson, 200 Mich. 313, 167 N. W. 55, L. R. A. 1918E, 763, cited in the Minnesota Supreme Court decision, wherein it is stated:

" 'He is invested with no part of the sovereign functions of the government. He is the agent of the importer, and deals with the government in that capacity. Moreover, his duties are not analogous to those of an executor or administrator. * * * He may act for whom and so far as he pleases. The license merely gives him the privilege of entering the goods for those who choose to employ him and for whom he chooses to perform such service.

* * * * *

> "**The character of the employment of a customhouse broker is private, as distinguished from public. His intervention is not necessary in the importation of goods.** The importer may make his own entry, or may employ any broker who has a license. The broker is paid by the importer, and is, as a matter of fact, his agent for the single transaction of entry. He performs no duties on behalf of the public, and the public is not concerned about his fees. **There are no considerations of public policy intervening which would affect the disposition of his earnings. His services stand upon no other basis than any other private employment.'** " (Emphasis supplied.)

The Minnesota Supreme Court decision also cited the New York case of People ex rel. Tower v. State Tax Comm., 282 N. Y. 407, 26 N. E. (2d) 955. In that case the State of New York enacted a so-called unincorporated business tax law upon various types of non-corporate enterprises competing with corporations in the state which are required to pay a corporate franchise tax measured by net income. That law exempted professions from its application. C. J. Tower & Sons was a partnership consisting of three partners devoting all their time to partnership affairs. It was held that the three partners were not practicing a profession within the meaning of the statute, and that, said partnership could have incorporated as such and transacted business as a customhouse broker. In such case, although the court did not make a direct finding that customhouse broker are or are not engaged in interstate commerce, such court calls attention to the fact that the nature of the business is that of rendering personal service to patrons, importers and exporters. It is clear, of course, that were customhouse brokers engaged in interstate commerce, or substantially so engaged, such broker

would not be subjected to the franchise tax of the State of New York.

A case very analogous to this case is that of Hopkins, et al., v. U. S., 171 U. S. 578, 43 L. Ed. 290, 19 S. Ct. 40. In that case Hopkins, et al., were engaged in the commercial business dealing in livestock in stock yards in Kansas City, Missouri, such stock being shipped from various states and to various states. Hopkins, et al., had agreed upon uniform rates to be charged for their services and the work performed was in the nature of a personal service association. The question of whether or not Hopkins, et al., had attempted to restrain trade and commerce among the several states directly raised the question as to whether or not the said Hopkins, et al., were engaged in interstate commerce. In that case this Honorable Court delves deeply into the question as to what constitutes interstate commerce, and when such firm or person is subject to state laws, or beyond the operation of state laws, and, therefore, subject to federal law concerning interstate commerce and restraint of trade. Inasmuch as Hopkins, et al., were livestock brokers or agents engaged in performing personal service in connection with interstate shipments, it is clear that the situation is very analogous to the services performed by a customhouse broker, who likewise performs personal services in connection with interstate commerce, which services, however, are merely collateral to interstate commerce.

This Honorable Court in holding that Hopkins, et al., livestock brokers, were engaged in purely local intrastate services said:

> "On the contrary, we regard the services as collateral to such commerce, and in the nature of a local aid or facility provided for the cattle owner

towards the accomplishment of his purpose to sell them; and an agreement among those who render the services, relating to the terms upon which they will render them, is not a contract in restraint of interstate trade or commerce."

This court further said:

"The charges of the agent on account of his services are nothing more than charges for aids or facilities furnished the owner, whereby his object may be the more easily and readily accomplished. Charges for the transportation of cattle between different states are charges for doing something which is one of the forms of, and which itself constitutes, interstate trade or commerce, while charges or commissions based upon services performed for the owner in effecting the sale of the cattle are not directly connected with, as forming part of, interstate commerce, although the cattle may have come from another state. Charges for services of this nature do not immediately touch or act upon, nor do they directly affect, the subject of the transportation. Indirectly, and as an incident, they may enhance the cost to the owner of the cattle in finding a market, or they may add to the price paid by a purchaser, but they are not charges which are directly laid upon the article in the course of transportation, and which are charges upon the commerce itself. They are charges for the facilities given or provided the owner in the course of the movement from the home situs of the article to the place and point where it is sold." (Emphasis supplied.)

In the case of Hooper v. People of the State of California, 155 U. S. 648, 15 S. Ct. 207, it was held by this court that the business of marine insurance, like any other insurance business, is not commerce or an instrumentality thereof, but merely an incident thereto and therefore, the constitutional provision as to interstate commerce did not prevent a state from prescribing con-

ditions upon which a foreign insurance company may do business in the state or from enforcing such conditions.

In 12 Corpus Juris, page 35, Sec. 36 (9), it is stated:

> "The business conducted by brokers and commercial merchants, or of exchanges of which they may be members, is not interstate commerce."

From the foregoing leading cases on the subject, it is clear that customhouse brokers are not federal employees or instrumentalities; that their duties are purely personal in nature rendered at the port of entry where their business is situated, and, that if their activities affect interstate commerce at all, such personal services are collateral and remote thereto, and that such services are merely incidental to interstate commerce.

C.

CUSTOM REGULATION RECOGNIZES THE LOCAL AND INTRASTATE CHARACTER OF THE BUSINESS OF CUSTOMHOUSE BROKERS

In scrutinizing the Tariff Act, particularly with reference to customhouse brokers, and the regulations promulgated by the Secretary of Treasury pursuant thereto, we find only one regulation which touches upon, and, which aids and assists in the interpretation which the Federal Government itself places upon the character and nature of the business of customhouse brokers. This regulation is Article 1410, Customs Regulations of 1937, which in part is as follows:

> "However, a licensee having a license in force in one district may on application to the committee be granted a license to transact business in another district without further examination, **provided it appears on investigation that the licensee is authorized to do business in the state or states in which**

> **such other district is situated,** and is prepared and qualified to render efficient service in such other district." (Emphasis supplied.)

Here the Federal Government expressly makes it a condition precedent for a broker who has a license in one district, and who desires to operate in another district, without further examination, to first satisfy the Federal Government that it has complied with the requirement that said broker "is authorized to do business in the state or states in which such other district is situated." The Federal Government, therefore, directly recognizes the local and intrastate character of the business of a customhouse broker.

The Minnesota Supreme Court, in the decision involved herein, states that the United States Treasury Department has thereby placed a practical construction on the character of the customhouse brokerage business as affecting commerce, by saying:

> "Subsequent to the adoption of this regulation, congress amended the tariff act in several respects, although the provisions governing customhouse brokers have remained substantially the same. By such regulation the treasury department has placed a practical construction on the character of the customhouse brokerage business as affecting commerce. It infers that it was the opinion of the treasury department that the statutory provision requiring a certificate of authority from a foreign corporation, as relating to such business, did not encroach upon interstate commerce. The provision that brokers may qualify to do business in more than one district, provided they are authorized to do business in the particular states in which such other districts are located, definitely implies that the department considers such business truly local and intrastate; and surely, if the business is intrastate when operated in two or more districts, it is equally intrastate

when operated in a single district. Inasmuch as the tariff act was revised subsequent to the regulatory provision referred to without modifying this provision referred to without modifying this provision, 'under the established rule Congress must be taken to have approved the administrative construction and thereby to have given it the force of law.' Helvering v. R. J. Reynolds Tobacco Co., 306 U. S. 110, 115, 59 S. Ct. 423, 426, 83 L. Ed. 536" (R., p. 741)) (9 N. W. (2d) 729).

It is clear that a customhouse broker is not the owner of the merchandise cleared through customs; that he does not direct nor control the buying, the selling nor routing of such shipment, and he at no time has physical contact with the merchandise. His services are strictly personal in nature, and are performed at such port of entry within the confines of the state wherein he operates. His business, therefore, is local and intrastate in character.

D.

CASES CITED BY PETITIONER DISTINGUISHED

The Minnesota Supreme Court has distinguished the cases mainly related upon by petitioner. As stated by the Minnesota Supreme Court, petitioner relies greatly upon the case of Stafford v. Wallace, 258 U. S. 495, 42 S. Ct. 397, and the case of Puget Sound Stevedoring Co. v. State Tax Commission, 302 U. S. 90, 58 S. Ct. 72. The Minnesota Supreme Court has stated that the Wallace case, supra, is not in point. In the Puget Sound Stevedoring Co. case, that court states that that case, while not squarely in point, believes that that decision fortifies its position taken in this case concerning the activities of a customhouse broker.

E.

THE MINNESOTA FOREIGN CORPORATION STATUTE IS A REASONABLE REGULATION AND REQUIREMENT, AND IS NOT AN ABSTRUCTION UPON INTERSTATE COMMERCE NOR INTERFERENCE THEREWITH

This court is invited to read in its entirety the Minnesota Supreme Court case which petitioner seeks to have this Honorable Court review. The Minnesota Supreme Court has rendered a distinct service in so ably and carefully reviewing and analyzing the question of the nature of the character of the business of a customhouse broker as applied to the commerce clause, and, has further arrived at the conclusion that the Minnesota Foreign Corporation Act is reasonable, and is not a "burden" upon commerce, nor an "obstruction," nor an "interference" therewith.

The Minnesota Supreme Court in so holding, said:

> "While it is our duty fully to recognize this most recent trend in the construction of the commerce clause by the Supreme Court of the United States, we are unable to find, even in these recent decisions, any inclination on the court's part to interfere in purely local and intrastate matters. It is entirely consistent with these decisions and in harmony therewith for the courts, when confronted by varying factual situations involving the commerce clause, to preserve whenever possible that fine balance between national and state solidarity which has been characteristic of our government during its century and a half of existence. Where congress has not stepped into the field of regulation because of the fact that some national public policy or concern is not involved, and where the business, as here, is local in character, relates only to personal services, is conducted for private profit, and is not an instrumentality of commerce, the courts should

be loathe to suggest that the state cannot enforce a reasonable regulation for the benefit of its citizens such as the statute here in question. The provisions of this statute require foreign corporations to obtain a certificate of authority as a prerequisite to maintaining an action in the courts of this state. We believe that this is a reasonable requirement, and not a hardship upon the business. Nor do we think that it is an obstruction upon the commerce itself nor an interference therewith under the facts in the instant case. On the other hand, it is a protection to the people of this state in providing for them a method for the service of process upon a foreign corporation without the necessity of going into a foreign jurisdiction to secure relief. Where the business so remotely affects the commerce, if at all, we conclude that the statutory requirement is a proper regulation for the state to prescribe, and that the constitutional power of congress is in no way impaired thereby" (R., pp. 742, 743) (9 N. W. (2d) 729, 730).

VI.

CONCLUSION

It is very clear from the Minnesota Supreme Court decision, that its decision is predicated upon the cases of this and other courts relating to customhouse brokers and analogous situations. The decisions sought by petitioner to be reviewed is not in conflict with the decisions of this court but on the other hand harmonizes therewith and with the department's regulations. The Tariff Act and The Regulations, and the validity thereof, are not questioned, and need no interpretation or construction. This case is one which does not affect the public revenue. It is a case purely local in nature concerning the application of the Minnesota Foreign Corporation Statute as affecting customhouse brokers maintaining

an office and operating within the Minnesota boundaries.

Wherefore, respondents pray that petitioner's application for Writ of Certiorari be in all things denied, and that respondents recover of petitioner their costs and disbursements herein.

Respectfully submitted,

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